BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2017090591
v.	ORDER TO SHOW WHY COSTS SHOULD NOT BE SHIFTED; WHY STUDENT'S COMPLAINT SHOULD NOT BE DISMISSED; AND SETTING HEARING
HAYWARD UNIFIED SCHOOL DISTRICT.	

On September 14, 2017, Student filed a request for due process hearing naming Hayward Unified School District. On September 19, 2017, the Office of Administrative Hearings issued a scheduling order, setting this matter for prehearing conference on October 30, 2017 at 10:00 a.m. This Prehearing Conference was scheduled to be convened by Administrative Law Judge Rita Defilippis, Office of Administrative Hearings.

On October 30, 2017, the Prehearing Conference was convened. The parties informed the undersigned that a settlement had been reached but signatures on the settlement agreement needed to be obtained. A continuance of the Prehearing Conference was granted for that purpose and the prehearing conference was continued to November 3, 2017, at 1:00 p.m. No settlement signature page was filed prior to the date and time the continued Prehearing Conference was scheduled to begin. The undersigned instructed OAH staff to contact attorneys for both parties twice during the week of October 30, 2017 to inquire as to the status of settlement. Messages were left for both counsel but no contact was made with OAH regarding settlement status until November 3, 2017 at 12:17 p.m. when Student's attorney called and informed OAH staff that "settlement was being processed". No final settlement document had been filed by 1:00 p.m. on November 3, 2017.

The undersigned attempted to convene the Prehearing Conference at the appointed time. Two attempts were made to contact Student's attorney Terri Palmquist: one at 1:00 p.m., and one at approximately 1:10 p.m.. Messages were left by the undersigned on Ms. Palmquist's voice mail each time a call was placed. Ms. Palmquist was not available to take either call and had not submitted any document asking to be excused from the prehearing conference. When Ms. Palmquist could not be reached, OAH staff contacted counsel for the District and informed her that the Prehearing Conference would not be proceeding due to Student's counsel's failure to appear and that an OSC would be issued along with a tentative continuance of the prehearing conference to 3:00 p.m. on Monday November 6, 2017.

APPLICABLE LAW

If the parent and local education agency have not resolved the due process complaint within 30 days of the receipt of the complaint, OAH is required to issue a decision within the next 45 days, unless a continuance is granted for good cause. (20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.51; Ed. Code, § 56502, subd. (f).) An ALJ presiding over a hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs.,tit. 5, § 3088, subd. (a).) An order to pay expenses is enforceable in the same manner as a money judgment or by seeking a contempt of court order. (Gov. Code, § 11455.30, subd.(b).) "Actions or tactics" is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ.Proc., § 128.5, subd. (b)(1).) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) "Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit [citations]." (Levy v. Blum (2001) 92 Cal.App.4th 625, 635.) In addition, there must be a showing of improper purpose. (Ibid.) A finding of "bad faith" does not require a determination of evil motive. (West Coast Development v. Reed (1992) 2 Cal.App.4th 693,702.)

DISCUSSION

Given the short time frames applicable to due process hearings, it is critical that the parties follow orders issued by OAH and participate in advancing the matter to hearing or resolution. Student's Counsel's non-compliance with procedure and failure to participate put the timely resolution of this matter in doubt. As the attorney of record, Ms. Palmquist is responsible for understanding and following OAH's procedures, including making all required appearances.

Student is ordered to show cause, at a telephonic hearing on Monday November 6, 2017, at 3:00 p.m., before Presiding Judge Margaret Gibson, as to why this matter should not be dismissed for failure to participate, prosecute or advance the matter and why costs incurred by OAH and by the District in preparing for the November 3, 2017 Prehearing Conference should not be shifted to Student as a result of Student's failure to appear. Should Student provide adequate justification to overcome dismissal at the hearing on the order to show cause, the hearing dates in the matter will be vacated and a status conference set pending notification of board approval of the settlement.

Ms. Palmquist is ordered to file a declaration with OAH no later than 12:00 p.m. on November 6, 2017, explaining her failure to appear at the PHC on November 3, 2017, and stating why the case should not be dismissed for failure to appear at the scheduled Prehearing Conference and why she and her client should not be liable for costs associated with the failure to appear. Failure of Ms. Palmquist to submit a declaration and appear at the hearing on the Order to Show Cause may result in a dismissal of this matter without further notice.

The PHC is continued and shall immediately follow the order to show cause hearing. Hayward' attorney is ordered to appear telephonically for the order to show cause hearing.

ORDER

1. Student's attorney shall file a declaration under penalty of perjury explaining her failure to appear at the PHC on November 3, 2017, no later than 12:00 p.m (noon) on November 6, 2017.

2. An order to show cause hearing shall be convened telephonically by OAH at 3:00 p.m. on November 6, 2017. Counsel for both parties are ordered to appear.

IT IS SO ORDERED.

DATE: November 3, 2017

DocuSigned by:
Rita Defilippis
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RITA DEFILIPPIS
Administrative Law Judge
Office of Administrative Hearings